UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HUMAN RIGHTS WATCH, Plaintiff, v. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, Defendant.	No. 13 Civ. 7360

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

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PRELIMINARY STATEMENT

This case arose from a joint investigation by Human Rights Watch ("HRW") and Columbia Law School's Human Rights Institute ("HRI") concerning potential human rights abuses occurring in federal prisons. In 2012, HRW and HRI filed Freedom of Information ("FOIA") requests to the Federal Bureau of Prisons ("BOP") and the Department of Justice's National Security Division ("NSD"), seeking information on BOP's treatment of individuals charged or convicted of terrorism-related offenses.

Fourteen months after HRW filed those requests, and despite extensive efforts to negotiate with BOP FOIA staff, neither BOP nor NSD had produced even a single responsive document, nor had they determined that any material was exempt from disclosure. HRW filed this lawsuit in October 2013, and only then did BOP finally begin producing documents. Over the course of the following 2 years, and in response to multiple court-ordered deadlines and court-ordered negotiations, BOP eventually released more than 1,300 pages of records in addition to database extracts containing literally thousands of data points about BOP's operations. BOP was ordered to provide further disclosure following summary judgment, when this Court determined that certain redactions and withholdings by BOP were unlawful.

Under FOIA, a party is entitled to its attorney's fees if it has "obtained relief" through a "judicial order, or an enforceable written agreement", or through a "voluntary or unilateral change in position by the agency." 5 U.S.C. § 552(a)(4)(E). HRW easily meets this standard. HRW was unable to obtain any disclosure at all before initiating this lawsuit; as a result of it, BOP has disclosed an enormous amount of highly-valuable information. Plaintiff is entitled to full recovery from BOP of its reasonable attorney's fees and expenses in the total amount of $130,418.0000. This amount consists of $130,068.00 in attorney's fees for 625.3 total hours of work performed, together with $350 in court filing fees.

FACTUAL BACKGROUND

Beginning in April 2012, HRW and HRI began a major investigation into human rights violations committed during the investigation, prosecution, and incarceration of terrorism suspects in the U.S. criminal justice system. *See* Compl. ¶¶ 11–12, ECF No. 1. That investigation was particularly concerned with unlawful, abusive, or excessive practices used in a discriminatory manner against American Muslims. *Id.*

On August 24, 2012, HRW and HRI jointly submitted ten FOIA requests to BOP and five FOIA requests to NSD ("Requests"). *Id.* ¶16. Those Requests sought information related to the number of individuals charged with or convicted of terrorism or terrorism-related offenses, and their conditions during detention. *Id.* The Requests were intended to contribute to HRW and HRI's investigation by (1) establishing a better public understanding of BOP's operations, particularly the extraordinary restrictions of liberty imposed upon certain classes of prisoners charged or convicted of terrorism-related offenses, and (2) investigating and documenting discriminatory or excessively harsh treatment of American Muslims in custody as a result of such charges or convictions. Mem. Supp. Pl.'s Cross-Mot. Summ. J. at 3, ECF No. 41. The Requests sought expedited processing because of the urgency of informing the public about the Government's practices with respect to the prosecution and detention of terrorism suspects, and because HRW and HRI intended to use the resulting information in a then-forthcoming report. Compl. ¶ 17, ECF No. 1.

For over a year, HRW and HRI, through their counsel at the Media Freedom and Information Access Clinic at Yale Law School ("MFIA"), sought to negotiate with BOP to facilitate a prompt response to the Requests. *See* Manes Decl. in Supp. of Pl.'s Mot. for Att'ys'

Fees ("Manes Decl.") ¶ 8. Those negotiations proved fruitless as BOP consistently missed deadlines and ignored communications from HRW and HRI's counsel. *See id.* ¶¶ 8–17. Nearly fourteen months after the Requests were filed, BOP had still failed to produce any documents responsive to the Requests. *Id.* ¶ 9.

On October 18, 2013, HRW initiated the present lawsuit seeking disclosure of the records sought in the Requests. *Id.* ¶ 18. On November 21, 2013, a day before BOP's response to the Complaint was due, BOP finally produced the first records. *Id.* ¶ 19. This response consisted of fewer than 100 pages that contained a fraction of the information sought. *Id.* Over the next seven months, while the parties negotiated a final agreement regarding the scope of BOP's subsequent searches for records, BOP produced an additional 149 pages responsive to HRW's requests and NSD released 493 pages in response to the original requests. *Id.* ¶¶ 24–25.

The parties engaged in extensive court-ordered negotiations and exchange of information in order to clarify HRW's original FOIA requests by reformulating them in terms that coincided with BOP's recordkeeping methods. *Id.* ¶¶ 20–23. These negotiations included an exchange of letters between the parties; a court-ordered meeting between BOP personnel and representatives from HRW in order to learn details about BOP's file systems and recordkeeping; and extensive, protracted negotiations between counsel over the terms of an agreement over what BOP would search for. *Id.*; *see* Order ¶¶ 3–4, ECF No. 10 (ordering the parties to engage in negotiations); ECF No. 13 (granting additional time for negotiations); ECF No. 15 (same); ECF No. 17 (same).

Following painstaking and detailed negotiations, the parties successfully reached an agreement regarding the additional searches that BOP would conduct and the information that BOP would produce. Manes Decl. ¶¶ 26–27; Order, ECF No. 19. The agreement specified precisely what information BOP would produce from its internal databases, ECF No. 19 ¶¶ 3–5, 8, as well as which additional documents would be gathered from paper files, *id.* ¶¶ 6, 9. In order to make the database extracts analytically useful, BOP agreed to identify each entry by a unique identifier in order to permit information to be linked across spreadsheets. In exchange, and as part of the agreement, HRW agreed to waive its right to challenge redactions in *any* documents that contained 12 categories of potentially personally-identifying information, such as name, date of birth, criminal case information, and citizenship information. *Id.* ¶ 3. The agreement included deadlines by which BOP would produce the specified material, and also required the parties to meet and confer in an effort to narrow disagreements regarding remaining redactions and withholding. *Id.* ¶ 10.

The parties' agreement was submitted in a Joint Stipulation and Proposed Order to the Court on April 24, 2014, Manes Decl. ¶ 26, which the Court approved on May 9, 2014. *Id.* ¶ 27; ECF No. 19. At the same time, the Court ordered that the case be closed and taken off the docket on the mistaken belief that the stipulated agreement resolved all issues in the case. Plaintiff moved to reopen the case, with BOP's consent, in order to permit the subsequent proceedings—including summary judgment—envisioned by the stipulation and order. ECF No. 20. The Court denied the motion. HRW then moved for reconsideration of this denial, again with BOP's consent. ECF Nos. 22–23. Following transfer of this case from Judge Baer's docket to Judge Oetken's docket, the Court granted the motion, reopening the case and reinstating it to the active docket. ECF No. 24.

Pursuant to the stipulated agreement and order requiring BOP to search for additional responsive records, BOP produced an additional several hundred pages of documents and 5 excel spreadsheets, which provided extensive raw data about hundreds of inmates' housing assignments and other conditions of confinement. Manes Decl. ¶ 27.

Among the documents produced by BOP over the entire course of the litigation, many contained extensive redactions. *Id.* ¶ 28. Plaintiffs identified those documents and redactions that they wished to challenge, and engaged in discussions with BOP in an effort to resolve these differences without need for litigation. *Id.* BOP was not willing to reconsider any of its redactions. Thus, in accordance with the terms of the stipulation and order, the parties notified the Court that they were unable to reach agreement regarding disputed issues and requested a briefing schedule for summary judgment, which the Court approved. ECF Nos. 26–27.

Between February and June 2015, the parties briefed cross-motions for summary judgment that focused on the lawfulness of BOP's redaction of information from five categories of records: spreadsheets regarding the population of Communication Management Units ("CMUs"); memoranda regarding the imposition of Special Administrative Measures ("SAMs"); memoranda regarding inmate requests for religious accommodations; certain "key indicators" documents; and a handful of redactions of information deemed "non-responsive." *See* Op. at 3–5, ECF No. 67. The briefing centered on the government's claim that its withholdings were justified under FOIA's privacy exemptions, § 552(b)(6), (7)(C), its exemption for law enforcement techniques, § 552(b)(7)(E), and its exemption for law enforcement materials disclosure of which pose a risk to life or safety, § 552(b)(7)(F). Over the course of briefing, BOP substantially changed its position with regard to the bases for withholding entire categories of information, substantially reducing its reliance on the latter two exemptions. *See* BOP Mem. of Law in Opp. to Pl.'s Cross-Mot. for Summ. J. at 17 n.12, ECF No. 50.

The Court held oral argument on the cross-motions for summary judgment on August 6, 2015. On September 16, 2015, the Court issued a decision finding that BOP had failed to justify several categories of contested redactions. *See* Op. at 19–26, ECF No. 67. In particular, the

Court ordered BOP to release the memoranda regarding SAMs without redacting the U.S. Attorney's Office handling each case; it ordered the government to release the records regarding religious accommodation without redacting the unit and cell assignments of particular inmates; and it ordered the government to release information from the "key indicators" documents that had been improperly deemed "non-responsive" to HRW's requests. *Id.* at 26. With respect to a fourth category of documents—the spreadsheets regarding CMUs—the Court found that the government had not adequately justified its redaction, on privacy grounds, of an entire column of "comments" specifying reasons for referring particular inmates to a CMU. *Id.* at 14–15. The Court accordingly ordered the government to submit those materials to the Court *in camera*, and invited the government to submit an affidavit explaining, line-by-line, why the material was exempt. *Id.*

In response to the Court's decision, BOP re-released over 500 pages of documents with fewer redactions. BOP also complied with the Court's order to submit documents for *in camera* review and filed a motion for reconsideration in conjunction with its affidavit opposing release of any additional information from the CMU spreadsheets. ECF Nos. 68–70 HRW opposed reconsideration and also responded to BOP's supplemental justifications for the redactions in question. ECF No. 71.

On June 23, 2016, the Court issued its final decision. Based on its *in camera* review, the Court found that BOP had improperly redacted four categories of information from the comments column of the CMU spreadsheet because general information regarding the movement and housing of inmates was not exempt and should not have been redacted. Op. at 7–8, ECF No. 73. The Court also found that information regarding inmate religious preference was improperly withheld because even though the material implicated certain privacy interests of inmates, the public interests in disclosure articulated by HRW outweighed those concerns and required disclosure. *Id.* at 7–9. The Court accordingly ordered BOP to release a version of the documents in question with fewer redactions. *Id.* Judgment was entered on the same day. ECF No. 74. This motion is timely filed within 14 days of judgment. Fed. R. Civ. P. 54(d)(2)(B)(i).

ARGUMENT

The Freedom of Information Act provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). Because HRW "substantially prevailed," and the fees sought are reasonable, the Court should grant this motion in its entirety.

I.
HRW IS ELIGIBLE AND ENTITLED TO RECOVER FEES FROM BOP

Under FOIA, the attorney fee inquiry is divided into two prongs: fee "eligibility" and fee "entitlement." *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011). HRW easily satisfies both prongs**.**

A. HRW Is Eligible to Recover Fees and Costs Because It Substantially Prevailed in This Case

A FOIA plaintiff is eligible for attorney fees if the plaintiff has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E). FOIA provides that a plaintiff "substantially prevails" by obtaining "relief through either (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." § 552(a)(4)(E)(ii). HRW has substantially prevailed under both standards.

HRW's suit clearly caused a "voluntary or unilateral change in position" by BOP sufficient to establish that HRW substantially prevailed. § 552(a)(4)(E)(ii)(I)-(II); *see also Warren v.*

Colvin, 744 F.3d 841, 844 (2d Cir. 2014) ("FOIA now provides for the recovery of litigation costs where an agency voluntarily complies with a records request."). BOP had produced not a single document in response to HRW's request before this lawsuit was filed, despite the fact that the request had been pending at the agency for fourteen months and despite the dogged, good-faith efforts by HRW's counsel to communicate with BOP's FOIA office in order to attempt to streamline and facilitate the search and review process. It was not until *after* HRW filed suit that BOP produced any records at all. Indeed, BOP's first production of documents—fewer than 100 pages—came the day before the original deadline for BOP's answer to the complaint. The course of the administrative proceeding in this case and the timing of BOP's productions compel the conclusion that it was HRW's lawsuit that caused BOP finally to begin to comply with HRW's Requests and, therefore, that HRW "substantially prevailed" in this matter and is entitled to fees. *See Warren*, 744 F.3d at 844.

HRW has also obtained relief through multiple separate court orders, further confirming its eligibility for an award of attorney's fees. For instance, following BOP's initial production of fewer than 100 pages, the Court entered an order setting specific deadlines for the release of any additional documents that BOP had identified as responsive. ECF No. 10 ¶ 5. Over the next seven months, BOP released 493 pages of documents pursuant to the Court order.

In response to the Court's next order, which gave effect to the parties' negotiated agreement regarding the additional searches that BOP would conduct, BOP produced another several hundred pages of records and 5 large spreadsheets. Manes Decl. ¶ 27; *see also* ECF No. 19. It bears emphasis that BOP's agreement to conduct these additional searches was prompted by the Court's intervention at the initial pre-trial conference and its subsequent order, both of which required BOP to sit down with HRW personnel and then to enter into negotiations with

HRW. In particular, the Court ordered BOP to enter discussions with HRW so as to permit HRW to clarify its requests in a manner that would permit BOP to search for the information sought. ECF No. 10 ¶ 3; Manes Decl. ¶¶ 21–23.

Following these court-ordered disclosures, HRW obtained additional information as a result of this court's rulings on summary judgment. In particular, HRW obtained over 500 pages of records with significantly fewer redactions pursuant to the Court's initial decision granting in part and denying in part plaintiff's cross-motion for summary judgment. ECF No. 67. Most recently, the Court has ordered BOP to produce less-redacted versions of still further records following its *in camera* review of certain documents. Op. at 9, ECF No. 73.

On this record, there is no question that HRW is eligible for fees. Before this lawsuit was filed, BOP produced nothing; after it was filed, and as a result of it, BOP turned over an enormous amount of information. HRW has "substantially prevailed" under 5 U.S.C. § 552(a)(4)(E)(ii) and is eligible for an award of fees.

B. HRW Is Entitled to Attorneys' Fees Because All Four Discretionary Factors Weigh in Its Favor

If a plaintiff is eligible for a fee award, the court has discretion to decide they are entitled to it. *Tax Analysts v. Dep't of Justice*, 965 F.2d 1092, 1093–94 (D.C. Cir. 1992). A plaintiff is entitled to an award if it "would promote the purpose of the FOIA to encourage the dissemination of information that benefits the public and discourage agencies from withholding valuable information." *Muffoletto v. Sessions,* 760 F. Supp. 268, 274 (E.D.N.Y. 1991). To make that determination, courts consider four factors: "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information." *Pietrangelo v. U.S. Army*, 568 F.3d 341, 343 (2d Cir. 2009). All four factors favor an award here.

1. Public benefit.

"Probably the most important consideration in determining entitlement to fees in a FOIA case is the benefit to the public which is to be derived from the release of the information sought." *Loglia v. I.R.S.*, No. 96 CIV. 2654(LAK)(RLE), 1997 WL 214869, at *4 (S.D.N.Y. Apr. 25, 1997). Whether disclosure benefits the public depends on "the significance of the contribution that the released information makes to the fund of public knowledge." *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 711 (D.C. Cir. 2014); *Muffoletto*, 760 F. Supp. at 275.

The public benefit factor heavily weighs in HRW's favor because the documents BOP released increase the "fund of public knowledge" concerning BOP's treatment of inmates charged or convicted of terrorism-related crimes, especially American Muslims. *See McKinley,* 739 F.3d at 711. Prior to this lawsuit, there was remarkably little publicly available information about the Communication Management Units (CMUs) and Special Administrative Measures (SAMs) that BOP uses for individuals charged or convicted of terrorism-related offenses. The documents that BOP released through this case reveal the number of individuals subject to those conditions as well as BOP's justifications for subjecting individuals to those conditions. HRW has used these documents to publish a report that details potential human rights abuses occurring in American federal prisons. *See* Human Rights Watch, Illusion of Justice (2014), https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions (hereinafter "Illusion of Justice"). Those abuses include discrimination against Muslims and unjustifiably harsh conditions of confinement. *Id.* The public plainly benefits by having this information out in the open. *See McKinley*, 739 F.3d at 711 (considering "the significance of the contribution that the released information makes to the fund of public knowledge”).

Furthermore, the information in this case is particularly important because it relates to a matter of significant public concern: the government’s efforts against terrorism, and its compliance with human rights obligations in the course of such efforts. While there has been significant public attention (and public disclosure) focused on the detention of terrorism suspects at Guantanamo Bay, Cuba, there has been much less sustained attention on how domestic federal prison facilities treat terrorism suspects who are under an indictment or a sentence. This FOIA request shined an important light on how inmates charged or convicted of terrorism-related crimes are being treated in domestic prisons, and it unearthed a wealth of detailed, factual information about how a number of particularly restrictive techniques are being deployed.

The information HRW has obtained in this case will allow the public better to evaluate the government’s practices, and to have a more robust and informed debate regarding the government’s treatment of individuals suspected of involvement in terrorism. Indeed, HRW has already published a major report on these issues based in part on the documents it obtained through this lawsuit. There is thus little doubt that HRW’s efforts in this case have a strong public benefit, and that an award of fees is therefore appropriate.

2-3. Commercial benefit and interest of plaintiff.

There is no doubt that the second and third factors also weigh strongly in favor of an award of fees to HRW. *See Tax Analysts*, 965 F.2d at 1095 (“[T]he factors of ‘commercial benefit’ and ‘plaintiff’s interest’ are closely related and often considered together.”). HRW is the largest human rights organization based in the United States. It is a non-profit organization and has derived no “commercial” benefit from this case. Indeed, the report that it published based, in part, on documents obtained through this litigation is available to the public free of charge. *See*

Illusion of Justice. HRW initiated this lawsuit in order to pursue a human rights investigation, and in order to advance the public interest in protecting human rights; it did not seek or obtain any private gain from this litigation. The second and third discretionary factors therefore weigh heavily in HRW's favor. *See Muffoletto*, 760 F. Supp. at 275 ("FOIA actions which are motivated by scholarly, journalistic, or public interest concerns are the proper recipients of fees awards." (internal quotation marks omitted)).

4. No reasonable basis to withhold.

The fourth and final factor "considers whether the agency's opposition to disclosure had a reasonable basis in law" and "whether the agency had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *McKinley*, 739 F.3d at 712 (quoting *Davy v. C.I.A.*, 550 F.3d 1155, 1162 (D.C. Cir. 2008)). BOP in this case displayed the type of "obdurate behavior" that also justifies a fee award. *See id.* Furthermore, BOP had no reasonable basis to withhold large amounts of requested information.

First, BOP's delay leading up to this litigation is a paradigmatic example of "obdurate behavior." *See McKinley*, 739 F.3d at 712. Before filing suit, HRW sought to speed the request along without need to resort to litigation. For instance, at BOP's suggestion, HRW identified a priority list of records that it asked BOP to search for first, leaving the rest to be handled later. Manes Decl. ¶ 15. BOP's FOIA officer made repeated promises to provide a response, but all of these promises were broken. *See id.* ¶¶ 10–14. Indeed, it was often difficult or impossible for HRW's counsel even to make contact with the FOIA officer. *See id.* ¶¶ 9–16. Frustrated with these delays, BOP filed an administrative appeal of BOP's failure to provide any timely response. Rather than prompt quick action, the appeal also languished. BOP missed the statutory deadline to adjudicate the appeal. By October 2013, 14 months after it filed the requests and several months after it filed the administrative appeal, it became clear to HRW that it would make no headway with BOP by continuing to pursue a cooperative approach and that BOP would not respond unless HRW filed suit. *Id*. at 9, 17. It was BOP's recalcitrance and "obdurate behavior" that necessitated this lawsuit, and that behavior also strongly militates in favor of an award of attorney's fees now. *See McKinley*, 739 F.3d at 712.

Second, BOP had no reasonable basis to withhold large portions of the requested information. BOP voluntarily produced hundreds of pages after HRW filed suit, even setting aside the stipulated agreement regarding additional searches that BOP would conduct in response to the request. Manes Decl. ¶¶ 18-24. Many of these documents were released with few or no redactions. Even those that were released with redactions still contained useful, non-exempt information that was readily segregated from the exempt material. BOP evidently did not have any "reasonable basis in law" for withholding all of these documents. *See McKinley*, 739 F.3d at 712. The same logic applies to the hundreds of pages that BOP released in response to the parties' Joint Stipulation of May 9, 2014. *See* ECF No. 19. BOP voluntarily agreed to that Joint Stipulation and produced responsive, non-exempt information because it had no "reasonable basis in law" for withholding those documents (or portions thereof).

Finally, at least some of BOP's redactions from the documents it produced were overbroad and unlawful. As noted above, HRW agreed to waive its right to challenge various categories of potentially identifying information, in order to mitigate any privacy objections to the release of other, non-identifying (or less-identifying) information. BOP nevertheless redacted a great deal of information from the CMU spreadsheets, SAMs memoranda, and religious accommodation requests – even including categories of information, such as housing and unit assignments – that it had released in other contexts.

In its September 16, 2015 Order, the Court evaluated BOP's redactions, weighing the public interest in disclosure of particular redacted information against the extent of the inmates' privacy interests in disclosure of information about them. *See* ECF No. 67 at 10–19. After conducting that balancing, the Court found that BOP had improperly withheld at least three categories of information: the Attorney's Office that handled inmates' cases (as reflected in the SAMs memoranda), inmates' jobs and cell assignments (reflected in the religious accommodation requests), and the inmate capacity of BOP facilities (in the "key indicators" documents). *Id.* at 26. The Court made these determinations without even examining the documents *in camera*, indicating that BOP's redactions on their face were without "reasonable basis in law." *See McKinley*, 739 F.3d at 712.

In addition, the Court was skeptical of BOP's redaction of the entire "comments" column in the CMU spreadsheets, some of which may have provided insight into the reasons for placement in a CMU and other issues in which the public had a significant interest. Op. at 14, ECF No. 67. That skepticism was born out. Following *in camera* review, the Court held that four categories of information in the "comments" column relating to the housing and movement of inmates were improperly withheld because "the generalized portion of these comments is reasonably segregable and not exempt."[1] Op. at 7–8, ECF No. 73. In addition, the Court found that the public interest in disclosure of "details regarding religious preference," clearly outweighed the privacy interest because it was "directly relevant to Human Rights Watch's asserted public interests," in particular the interest in determining whether Muslim inmates received different and worse treatment. Op. at 8, ECF No. 73.

[1] These categories were described by BOP as "specific transfer/released information," "INS/deportation information," prior institution/designation information," and "information regarding return to CMU."

In short, BOP had no valid basis for withholding the vast majority of documents that it later produced over the course of this litigation. BOP's unwillingness to provide information that HRW lawfully requested constitutes the type of "obdurate behavior" that attorney's fees are designed to deter. *See McKinley*, 739 F.3d at 712. Moreover, HRW was correct to hold the government to its burden of proof by challenging its redactions and withholdings on summary judgment, as those efforts yielded significant additional disclosure of information of public interest. Awarding HRW's fees in this case is fully justified, compensating HRW for its public-spirited efforts to obtain information of significant value and at the same time sending a strong signal to BOP that if it continues to engage in such egregious delay in response to FOIA requests, it will have to pay attorney's fees when a requester opts to sue in order to compel BOP to comply with the law.

II.
THE FEES REQUESTED ARE REASONABLE AND JUST

HRW moves the Court to award a total of $130,068.00 in attorneys' fees and $350 in costs. *See* Manes Decl. Ex. A. HRW's request for attorneys' fees is supported by contemporaneously-recorded time records kept by HRW's attorneys and law students. *See* Manes Decl., Exs. B–D. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983). HRW's request for costs is supported by evidence on the case docket. *See* ECF No. 1 (receipt for filing fee.)

HRW's fees in this matter are reasonable. In determining whether fees are reasonable, courts begin with the lodestar amount, which is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An attorney's reasonable hourly rate is calculated "on the basis of rates charged to clients of private law firms," *Miele v. N.Y. Tate Teamsters Conference Pension & Ret. Fund*, 831 F.2d

407, 409 (2d Cir. 1987), and in accordance with "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

A. The Rates Claimed Are Reasonable

HRW's representation in this case has included a group of Yale Law School student members of the Media Freedom and Information Access clinic, under the supervision of Jonathan Manes, Esq. and David A. Schulz, Esq., Clinical Lecturers in Law at Yale Law School. Manes Decl. ¶ 3.

Mr. Schulz, a 1978 law-school graduate, is a partner in the law firm Levine Sullivan Koch and Schulz LLP and a specialist in Freedom of Information and First Amendment law. *Id.* ¶ 50. He has represented journalists and news organizations in access and newsgathering claims for more than 30 years. *Id.* Mr. Schulz has frequently taught these subjects as an adjunct professor at Columbia Law School and Fordham Law School, and writes an annual summary of developments in the law of access for the Practicing Law Institute. *Id.* ¶ 51. Over the course of his career, he has litigated many cases asserting statutory and First Amendment claims for public access to information in the national security context. *Id.* ¶ 53. He has also advised numerous journalists and news organizations on First Amendment and other legal issues involved in gathering and publishing news in the national security context, where public disclosure of classified or otherwise sensitive information is often at issue. *Id.*

Mr. Manes, a 2008 law-school graduate, has practiced for 7 years as a civil liberties and government transparency lawyer. *Id.* ¶¶ 42–45. He served for two years as a legal fellow at the American Civil Liberties Union's National Security Project where he litigated complex Freedom of Information lawsuits on issues including targeted killing, military detention, and torture. He also served for two years as John J. Gibbons Fellow in Public Interest and Constitutional Law at

Gibbons P.C. in Newark, New Jersey, where he litigated a variety of civil rights cases in addition to FOIA lawsuits. He has been a supervising attorney at the MFIA Clinic for three years, and has served as lead counsel in this litigation since its inception in October 2013. *Id.*

Over the course of his career, Mr. Manes has been continuously involved in litigating FOIA cases on issues relating to national security, including detention of terrorist suspects, and has developed specialized expertise in the area. *See, e.g.*, *ACLU v. Dep't of Defense*, No. 09-cv-8071 (S.D.N.Y. filed Sept. 22, 2009) (lawsuit seeking access to records regarding U.S. detention facility in Bagram, Afghanistan); *ACLU v. Dep't of Justice*, No. 10-cv-436 (D.D.C. filed Mar. 16, 2010) (lawsuit seeking access to records regarding targeted killings); *Qatanani v. Dep't of Justice*, No. 12-cv-4042 (D.N.J. filed June 29, 2012); *Qatanani v. Dep't of Homeland Security*, No. 12-cv-5379 (D.N.J. filed Aug. 24, 2012); *ACLU v. NSA*, No. 13-cv-9198 (S.D.N.Y. filed Dec. 30, 2013) (seeking rules that govern surveillance of U.S. persons under Executive Order 12,333); *In re Orders Interpreting Section 215 of the PATRIOT Act*, No. Misc 13-02, 2013 WL 5460064 (Foreign Intel. Surv. Ct. 2013) (asserting qualified right of public access to important opinions of the Foreign Intelligence Surveillance Court).

Mr. Schulz's hourly rate, ranging from $485 to $500 over the period in question, is reasonable—indeed, it is heavily discounted—based on prevailing market rates for services by attorneys of reasonably comparable skill, experience, and reputation. Other media law experts surveyed who are partners at New York City law firms regularly billed hourly rates of between $725 and $1,025 in 2016. *See id.* ¶ 48.

Mr. Manes' hourly rate, ranging from $345 to $355 over the period in question, is likewise eminently reasonable for an attorney with 8 years' experience. These rates correspond to the discounted hourly rates billed to regular clients of Mr. Schulz's law firm, Levine, Sullivan, Koch & Schulz LLP. *Id.* ¶ 36. These rates are significantly lower than associates with comparable experience at other New York City law firms surveyed, which regularly billable clients in the range of $500-600 for similar services.[2] *See id.* ¶ 37.

These rates are also consistent with case law in this district awarding fees at similar and higher rates to attorneys litigating civil rights cases. *See, e.g.*, *Vilkhu v. City of New York*, No. 06-cv-2095, 2009 WL 1851019, at * 4 (S.D.N.Y. June 26, 2009) ("A review of precedent in the Southern District reveals that rates awarded to experienced civil rights attorneys over the past ten years have ranged from $250 to $600, and that rates for associates have ranged from $200 to $350, with average awards increasing over time.") (collecting numerous cases), *vacated on other grounds*, No. 09-1178, 2010 WL 1571616 (2d Cir. Apr. 21, 2010); *LV v. N.Y. City Dep 't of Educ.*, 700 F. Supp. 2d 510, 518–19 (S.D.N.Y. 2010) (awarding rates up to $600/hour in a civil rights case); *Adorno v. Port Auth. of N.Y. & N.J.*, 685 F. Supp. 2d 507 (S.D.N.Y. 2010) (awarding rates up to $550/hour to civil rights litigators).[3]

Case law and evidence of market rates also establishes that $150 per hour is a reasonable hourly rate for law student interns. More than two years ago, Judge McMahon of this Court concluded that $125 was an appropriate hourly rate for law student interns in the Fordham Law School clinical program. *M.C. ex rel. E.C.*, 12-cv-9281 CM AJP, 2013 WL 2403485, *7–8 (S.D.N.Y. June 4, 2013). More recently, the Court of Appeals for Veterans Claims approved an EAJA fee application submitted by a Harvard Law School clinic seeking an hourly rate of $145 for law students representing a veteran in a disability benefit appeal. *See Froio v. McDonald*, No. 12-3483, 2015 WL 3439252, at *22–23 (U.S. Ct. App. Vet. Cl. May 29, 2015); Appellant's App. For Att'ys' Fees at 11–12, *Froio*, No. 12-3483 (U.S. Ct. App. Vet. Cl. filed June 11, 2014). The rate sought here is also a significant discount from the market rates charged in this district for summer associates and law student clerks, even though the law student interns who represented the Plaintiff in this case have the same level of experience. Manes Decl. ¶ 55. Indeed, summer associates and law student clerks at one New York City law firm had a billable hour rate of $235 in 2015. *Id*. The rates of the law student interns are therefore reasonable for the services provided.

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[2] The figures are provided by partners at Davis Wright & Tremaine LLP and at Proskauer Rose LLP. For previous years, an associate at Davis Wright & Tremaine LLP had a billable hour rate of $460 in 2015 and $425 in 2014.

[3] These rates are also consistent with market rates that the Department of Justice has endorsed for attorneys practicing in the Washington, D.C. area—known as the "Laffey Matrix"—where market rates are roughly equivalent to those in this district. Manes Decl. ¶ 38; see generally *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985).

B. The Number of Hours Claimed Is Reasonable

With regard to the reasonableness of the hours expended, HRW's attorneys have provided detailed billing records, which reflect the date, time, and nature of the work done by each attorney. Recognizing that student attorneys may "spend more time accomplishing a task than more experienced personnel" and that "the best clinical instruction deliberately invests more time in supervision and instruction than a law office can provide," plaintiff's attorneys have made a good faith billing judgment to "adjust for this inefficiency" prior to submitting this request. *Moon v. Gab Kwon*, No. 99 CIV. 11810 (GEL), 2002 WL 31512816 at *3–4 (S.D.N.Y. Nov. 8, 2002). Indeed, Mr. Manes, the lead supervising attorney, has carefully reviewed the billing records to remove purely pedagogical and otherwise non-billable time. In particular, plaintiff has excluded all time spent by paralegals, much of the time spent by Clinic Director David Schulz, and all of the time spent by Clinic students who did not keep contemporaneous time records. Manes Decl. ¶¶ 31, 33.[4] Moreover, plaintiff has excluded the time that the supervising attorneys and law student interns spent on pedagogical or learning activities, including weekly supervision meetings and classroom discussions. *Id.* ¶ 31. For the same reason, plaintiff has excluded time that the law student interns spent conducting background research on procedural and legal issues that are common to most federal litigation. *Id.* This Court has previously found a law clinic's billing to be reasonable where, as here, supervisors and students excluded "instructional time." *See, e.g.*, *Moon v. Gab Kwon*, No. 99-cv-11810, 2002 WL 31512816 at *4; *M.C. ex rel. E.C.*, 2013 WL 2403485 at *11–14 ("Where the fee applicant's own billing adjustments are adequately documented and sufficiently substantial 'to account for the unavoidable inefficiency, and overlap between instruction and litigation, inherent in clinical law practice,' the Court need not make additional substantial reductions.").

In addition, plaintiff's counsel has carefully reviewed all billing records to eliminate time not expended directly on the court proceedings. Manes Decl. ¶¶ 31, 35. Where billing entries did not sufficiently describe the nature of the work completed, the entries were deleted. *Id.* ¶ 35. As a result of all of these reductions, the resulting set of bills is entirely reasonable and is in fact very modest in relation to the work actually performed.[5]

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[4] It bears mention that student time records are absent for long stretches of this litigation. As a result, plaintiff seeks fees for significantly fewer hours than were actually expended on this lawsuit.

[5] Should the Court grant Plaintiff's request for fees, Plaintiff also requests compensation for the time they spend litigating this fee application. See, e.g., *Comm., I.N.S. v. Jean*, 496 U.S. 154 (1990). The billing records submitted with this motion contain all work completed to date on this fee application.

CONCLUSION

HRW has substantially prevailed in this case and is eligible for and entitled to recover fees under the FOIA. The award HRW seeks is reasonable and supported by the attached declaration. HRW therefore requests that the Court award it $130,418.00 in fees and costs.

Respectfully submitted,

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